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AUTHOR Thomas, Stephen B.
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ABSTRACT

This chapter includes all cases involving student-athletes, coaches, athletic directors, athletic associations, booster organizations, sports programs and events, and sports facilities and equipment at both the K-12 and higher education levels, but does not include case law involving physical education or intramural participation. Sections discuss cases regarding: (1) students' eligibility to participate in school sports; (2) equality of programs; (3) enforcement of rules; (4) sport-tort cases; (5) employment cases affecting coaches, athletic directors, or athletes; and (6) miscellaneous cases including use of an amusement tax, access to school and university records, and the collection of athletic fees. (MLF)

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SPORTS

Stephen B. Thomas

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INTRODUCTION

This Chapter includes all cases involving student-athletes, coaches, athletic directors, athletic associations, booster organizations, sports programs and events, and sports facilities and equipment at both the K-12 and higher education levels, but does not include case law involving physical education or intramural participation.

ELIGIBILITY

This section contains eight cases: one involved a student ruled ineligible because of misconduct; one questioned the use of grade point average as a criterion for participation; one challenged the results of a physical examination; one concerned outside participation; one denied a former professional athlete the opportunity to participate; and three involved the eligibility of transferring students.

Discipline

In an Iowa case, a high school student brought suit challenging a school board decision declaring him ineligible to compete on the wrestling team. At the time of the decision he had a nearly perfect record and was the defending state champion. Furthermore, he planned to attend college on a wrestling scholarship. The decision of the board was based on evidence that the plaintiff, plus three other male youths, engaged in multiple acts of sexual intercourse with a sixteen-year-old female student. Following an investigation, the principal concluded that the plaintiff had "committed a breach of discipline by engaging in conduct which interfered with the maintenance of school discipline and by engaging in behavior which was antagonistic to the rights of [named redacted] to attain her education."¹ The district court held that the plaintiff was provided with an appropriate hearing, the board's decision was not arbitrary or capricious and did not violate substantive due process, and the decision did not abridge the plaintiff's right to sexual privacy.

Grades

A school district rule requiring students to maintain a 2.0 (C) average in order to participate in extracurricular activities was challenged in a Montana case.² The state supreme court held that participation in such

1. *Brands v. Sheldon Community School*, 671 F. Supp. 627, 629 (N.D. Iowa 1987).

2. *State ex rel. Bartmess v. Board of Trustees of School Dist. No. 1*, 726 P.2d 801 (Mont. 1986).

activities is not a fundamental right and that neither the equal protection nor equal educational opportunity concepts were violated. The grade requirement operated as an incentive for those students who wished to participate and also allowed for additional study time for those who did not maintain the 2.0 average.

Medical Examination

In a unique case, a junior high school student brought suit against a school physician and district challenging the physician's determination that he was not physiologically mature enough to try out for the high school tennis team. The physician had simply followed the procedures and standards established by the state commissioner of education in evaluating the physiological maturity of athletes who want to participate at levels of competition above their own. As a result of being ruled ineligible, the plaintiff alleged negligence, negligent infliction of emotional distress, and medical malpractice. The state supreme court, appellate division, held that the student failed to state a cause of action.³

Outside Participation

In a case from the Colorado Court of Appeals, five members of the high school swim team challenged the state athletic association bylaw prohibiting outside competition. Specifically, the rule provides that players certified to participate as members of a high school sport may not compete on any other team, nor in any nonschool activity or event in that sport, during the season of that sport.⁴ The athletes contended that this regulation violated their rights to freedom of association, due process, and equal protection. The court held that the rule did not prohibit the plaintiffs from associating and practicing with other teams; it merely required that they choose between competing on either the school team or a nonschool team during the season. Accordingly, the bylaw was not found to impermissibly burden the association rights of the plaintiffs. Furthermore, the appeals court agreed with the trial court that there was no constitutionally protected right to participate in interscholastic athletics, that the due process clause had not been violated, and that the rule rationally furthered a legitimate state purpose and therefore did not violate plaintiffs' right to equal protection.

3. *Sitomer v. Halt Hollow Hills Cent. School Dist.*, 520 N.Y.S.2d 37 (App. Div. 1987).

4. *Zunents v. Colorado High School Activities Ass'n*, 737 P.2d 1113, 1114 (Colo. Ct. App. 1987).

Participation as a Professional

In June of 1980, the NCAA issued an official directive which declared that all Major Junior A ice hockey teams in Canada and the United States are professional teams within the meaning of its constitution and bylaws. The plaintiff in a Michigan case was a former participant in the Canadian league, but later wanted to attend the University of Michigan and play on the university intercollegiate team. An NCAA eligibility committee initiated a hearing and concluded that the plaintiff had played professionally and was therefore ineligible for intercollegiate hockey. On appeal, the Sixth Circuit held that the student was not denied his right to associate with professional hockey players; that the regulation did not infringe upon his father's constitutionally cognizable right to raise his son; and that the plaintiffs failed to allege that state university officials caused, directed, or controlled the implementation of the challenged rules.⁵

Transfer

In a Seventh Circuit, Illinois case, a private religious school challenged a high school association bylaw making a transferring student eligible for athletics only if he transferred from a private to a public school.⁶ The school proposed that the regulation violated both the equal protection and due process clauses. The appeals court disagreed and held that the bylaw was rationally related to a legitimate purpose of placing public schools on equal footing with private schools in regard to student recruitment and that due process had not been violated. The plaintiff, as a private member institution, could have submitted amendments or proposals to the association, but had not done so and in fact had never attended meetings of the association's legislative body.

In a second transfer case, a Florida court permitted the retroactive application of an untimely "waiver form."⁷ State association regulations permitted a transferring student to participate in athletics without meeting the one-year residency requirement only if the principals of the former school and the current school signed a waiver form. Because the form had not been signed by the time many of the games were played, the state association ruled the athlete ineligible and required the team to forfeit all of the games in which he played. The court enjoined the association from requiring forfeiture and from declaring the student

5. *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987).

6. *Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671 (7th Cir. 1987).

7. *Florida High School Activities Ass'n, Inc. v. Temple Baptist Church, Inc.*, 509 So. 2d 1381 (Fla. Dist. Ct. App. 1987).

ineligible. However, the court refused to address whether the bylaw was unconstitutional and reversed that part of the lower court decision without addressing the merits.

In Florida, an athletic associatizon rule states that "no student not attending his zoned school can participate in co-curricular activities without a waiver from the former principal" and that the "former principal can prevent co-curricular participation for the full four years the student is in high school." The plaintiff transferred for academic reasons (the school to which he transferred operated an ROTC program), but nevertheless was refused the opportunity to play basketball. A hearing officer overruled the principal's decision and stipulated only a one year loss of eligibility. The court went even further and concluded that the rule denied the student's right to establish eligibility by a rational basis.⁸

EQUALITY OF PROGRAMS

Prior to *Grove City College v. Bell*⁹ the majority of the cases under this category would have been filed under title IX of the Education Amendments of 1972. Section 1681(a) of that statute states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance." Specifically in regard to sports, the Act requires that recipient programs provide equal athletic opportunities for members of both sexes. In determining if equal opportunities are being provided, a number of factors are considered: (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; and (10) publicity.

Title IX has not been used as a basis of suit in recent years, because the Supreme Court declared the law to apply only to recipient programs, and not to institutions. That decision has been controversial over the years, but was supported by the actual wording of the statute, the legislative history, and the fact that versions of the law prior to the enacted version required an institution-wide approach but were rejected. Notwithstanding the above, Congress has now passed the Civil

8. *Staten v. Couch*, 507 So. 2d 702 (Fla. Dist. Ct. App. 1987).

9. *Grove City College v. Bell*, 465 U.S. 555 (1982).

Rights Restoration Act which will "restore" the Act to institution-wide coverage. President Reagan vetoed the bill, but Congress overrode the veto.

Given the above, claims of inequality and sex discrimination in future years will again be based on title IX. Over the past few years, however, related cases were based on either the fourteenth amendment (middle-tier scrutiny) or state equal rights amendments (strict scrutiny). In 1987, there were only four related cases: two general; one dealing with the right of a girl to play on a boys' team; and one dealing with the right of a boy to play on a girls' team.

General

In a federal district court case out of Pennsylvania, a class of women student-athletes brought suit claiming sex discrimination in the intercollegiate athletic program at Temple University.¹⁰ The court held that the university and its counsel were subject to sanctions for improperly communicating with plaintiffs and for discouraging plaintiffs from meeting with their counsel. The court required the university to provide a corrective notice to all female student-athletes to be distributed at defendants' expense, to pay costs and attorney fees resulting from the improper communication, and to pay a fine.

The Supreme Court of Washington examined a claim of sex discrimination under the state equal rights amendment against a state university.¹¹ The lower court found that the university had discriminated and awarded damages, injunctive relief, attorney fees, and costs. Plaintiffs and the defendant appealed the calculations and procedures of the court. The state high court held that the trial court was required to include the football program (revenues, scholarships, etc.) in fashioning a remedy. The lower court had excluded football from the determination of "equality" because it was viewed as unique among sports in the amount of revenue involved, the number of participants, the number of spectators, and media interest. The state supreme court ruled that this omission was in error. The court reasoned that the ERA obviously did not contain an exception for football and that such exclusion "would prevent sex equity from ever being achieved since men would always be guaranteed many more participation opportunities than women, despite any efforts by the teams, the sex equity committee, or the program to promote women's athletics under the injunction."¹²

10. *Haffer v. Temple Univ.*, 115 F.R.D. 506 (E.D. Pa. 1987).

11. *Blair v. Washington State Univ.*, 740 P.2d 1379 (Wash. 1987).

12. *Id.* at 1383.

Girl to Play on Boys' Team

The only 1987 case in this category involved a female elementary student who wanted to play tackle football. The Oregon Court of Appeals held the case moot, because the student had moved from the district.¹³

Boy to Play on Girls' Team

In a New Jersey case, a high school boy wanted to play on the girls' field hockey team and challenged his exclusion under the federal Constitution and state antidiscrimination law. The court held that the interscholastic athletic association regulation prohibiting his participation did not violate the federal equal protection clause, the state constitution, or state statute.¹⁴ The association justified its policy by stating that it promoted equal athletic opportunities for females and that it helped redress the effects of past discrimination and disparate treatment relating to girls' athletics. The court noted that if boys were permitted to play on girls' teams, there would be a substantial risk that the boys would dominate and thereby displace the girls from those teams.

ENFORCEMENT OF RULES

Membership

A division of the New York State Public High School Athletic Association brought suit against the association's executive committee for reversing its decision to deny full membership status to a private school.¹⁵ According to association bylaws, nonpublic schools may petition for full membership or may simply compete as a "Friend and Neighbor." The latter status, however, does not permit the institution to vote on association business, or to participate in postseason championship competition. The private school in question had previously participated as a "Friend and Neighbor" and sought full membership. By a vote of fifty-one to thirty-three, the school was denied membership status. However, the executive committee overruled that decision by a vote of thirteen-to-six. On appeal to the state supreme court, appellate division, the court held that there was no administrative appeal to the executive committee from the result of a vote by the member schools.

13. *Pabst v. School Dist. No. 59, Eagle Point*, 737 P.2d 151 (Or. Ct. App. 1987).

14. *B.C. v. Board of Educ., Cumberland Regional School Dist.*, 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987).

15. *Section VI of the N.Y. State Pub. High School Athletic Ass'n, Inc. v. New York State Pub. High School Athletic Ass'n, Inc.*, 521 N.Y.S.2d 901 (App. Div. 1987).

Accordingly, the vote of the member institutions was final and the private school may not receive full membership.

Probation/Sanction

In a federal district court case, the University of Washington sought a preliminary injunction to prevent the NCAA from sanctioning the university because it failed to drug-test its athletes as a condition of eligibility.¹⁶ Had the university continued in its efforts to drug test student-athletes, it would have violated a court order obtained by a student who claimed the requirement was unconstitutional. In spite of this previous court order, the court ruled in favor of the NCAA and claimed that the plaintiff had failed to show irreparable harm. The court also observed that a process existed by which the institution could obtain a hearing and, if necessary, an appeal from any attempted sanction.

Persons affiliated with the men's basketball team at Bradley University brought suit against the NCAA challenging its sanction.¹⁷ The court held that the NCAA, by imposing sanctions against member institutions that violate association regulations, was not involved in state action. No due process, equal protection, or section 1983 violation was found to exist. Furthermore, the court held that current members of the team, who were not responsible for the violations, still did not have a protected property interest in postseason competition, gaining tournament experience, or securing professional careers in athletics.

In a related Mississippi case, the members of a high school baseball team sought an injunction prohibiting the one-year probation of the team.¹⁸ The probation followed an incident where the school was required to forfeit a game because the coach, who had been ejected for arguing with the umpire, refused to leave the field. The court held that the student-athletes were not a party to the contract between the high school and the association and that neither their expectation of college scholarships, nor their interest in interscholastic athletics, created a property interest protected by due process.

TORT

In 1987, there were fifteen sport-tort cases: two intentional; thirteen negligence.

16. *O'Halloran v. University of Wash.*, 672 F. Supp. 1380 (W.D. Wash. 1987).

17. *Hawkins v. NCAA*, 652 F. Supp. 602 (C.D. Ill. 1987).

18. *Mississippi High School Activities Ass'n, Inc. v. Farris*, 501 So. 2d 393 (Miss. 1987).

Intentional

Assault and Battery. A basketball player struck a second player with his fist. The injured athlete brought suit against the individual who struck him, the state of California, the university athletic director, and the basketball coach. A jury previously provided the injured player with a settlement of \$25,000 from the person who struck him, but did not allow him to collect from the other named defendants. The lower court held that basketball players are not employees of the state and therefore recovery under the doctrine of respondeat superior was not permitted. A state court of appeals affirmed that decision and concluded that from the "standpoint of public policy consideration, exposing those institutions to vicarious liability for torts committed in athletic competition would create a severe financial drain on the [s]tate's precious educational resources."¹⁹

Defamation. This case emanated from New York State where a former high school coach brought action to recover damages, alleging that a letter and statements issued by the superintendent concerning a student-athlete's death were defamatory.²⁰ The student died while playing football, but had not taken the required physical examination nor had his parents signed a consent form permitting him to play. Following an investigation of the incident, the superintendent issued several letters of reprimand, and placed one of the letters in the coach's file. The superintendent also indicated publicly that she would officially reprimand each member of the coaching staff who had not followed district procedures. The court held that the superintendent was protected by absolute privilege with respect to the letters, and by qualified privilege with respect to the statements made to the press. Furthermore, the coach was unable to prove malice in his effort to overcome the qualified privilege defense.

Negligence

Negligence cases litigated in 1987 can be grouped into three categories: suits from participants and cheerleaders who were injured while participating or preparing to participate; suits from participants who were injured while en route to a game; and suits from spectators who were injured while in attendance.

Participants. The mother of a football player who became ill at practice and later died brought suit under section 1983 and the state

19. *Townsend v. State*, 237 Cal. Rptr. 146 (Ct. App. 1987).

20. *Santaviceca v. City of Yonkers*, 518 N.Y.S.2d 29 (App. Div. 1987).

wrongful death statute.²¹ The district court held that the action against members of the Board of Trustees of State Institutions of Higher Learning were barred by the eleventh amendment and that board members were entitled to qualified immunity for actions taken in their individual capacity. However, the mother was found to have stated a claim against the coach, the physician, and the trainer for negligence and breach of contract under state law. Accordingly, the motion to dismiss was granted in part and denied in part.

In a second football case, the player was performing an exercise referred to as "liners," requiring him to run wind sprints along the yard lines on the artificial turf inside the field house.²² After completing a sprint, the plaintiff proceeded beyond the marked area and struck a wire-reinforced glass door with his foot. His foot and leg were seriously injured. The Ohio Court of Appeals held that the state university was not negligent in failing to replace the reinforced glass with safety glass and that the use of reinforced glass was not an absolute nuisance rendering the university liable for injuries.

In a third football case, the injured player (an Ohio resident) brought action against the University of Virginia claiming that he received improper medical care when his wrist was injured.²³ The Ohio Court of Appeals held that the university enjoyed sovereign immunity and that this action was one for personal injury and thus was governed by the tort statute of limitations (two years). The defendant's motion to dismiss was affirmed.

The final football, negligence case of 1987 involved a former student who sought to recover for medical expenses which he claimed were incurred in connection with treatment of his injury.²⁴ None of the claimed expenses were in connection with treatment by designated team physicians. The plaintiff was dissatisfied with the treatment provided him and elected to seek treatment elsewhere. Some of the expenses were incurred while the plaintiff was a student; other expenses were incurred after he had entered the work force. The Court of Appeals of Georgia held that the plaintiff failed to produce medical testimony to support his position that his prior injury was in fact the cause of his more recent physical infirmities.

In an Indiana case, a student sought to recover damages for injuries sustained while participating in recreational baseball practice.²⁵ All students interested in playing baseball were invited to participate. The

21. *Sorey v. Kellett*, 673 F. Supp. 817 (S.D. Miss. 1987).

22. *Curtis v. State*, 504 N.E.2d 1222 (Ohio Ct. App. 1986).

23. *Barile v. University of Va.*, 507 N.E.2d 448 (Ohio Ct. App. 1986).

24. *Eberhart v. Morris Brown College*, 352 S.E.2d 832 (Ga. Ct. App. 1987).

25. *Swanson v. Wabash College*, 504 N.E.2d 327 (Ind. Ct. App. 1987).

practice was conducted by members of the varsity team, but was not sponsored by the college. Notwithstanding the above, participants were permitted to use the baseball team's equipment and the dean of men provided the funds necessary to purchase baseballs. During a practice, the plaintiff was struck in the eye by a batted ball. The state court of appeals held that the college did not have a duty to supervise the activities and that the student who organized the practices was not an agent of the college. Accordingly, the college was not liable under the respondeat superior theory.

In a second baseball case, a high school outfielder claimed that school officials had been negligent for injuries he sustained when he collided with an infielder during practice.²⁶ The plaintiff claimed that the school failed to warn him of the danger of collision, failed to adequately and reasonably supervise the practice, failed to post sufficient personnel to watch for possible collisions, conducted the practice in an unreasonably dangerous manner, and allowed supervisory personnel to participate directly in the practice. The Supreme Court of Indiana held that the school district and the coaching staff breached a duty to exercise reasonable care in supervision, but that the athlete had incurred the risk of collision on the baseball field. Given the above, the decision of the lower court to grant summary judgment for the defendant was affirmed.

In a Kentucky case, a wrongful death action resulted from the electrocution death of a student-athlete who was using a whirlpool bath at the school.²⁷ The state appeals court held that the absence of a ground fault interrupter in wiring the whirlpool, as modified by the football coach, was the last and only substantial factor causing the death of the student. Given the aforementioned, the coach was solely liable for his negligent failure to install the interrupter as required by the national electric code.

In 1987, there were two negligence cases involving cheerleaders. In the first case, the plaintiff challenged a Texas statute that exempted school districts from tort claims.²⁸ The Court of Appeals of Texas held that the statute limiting liability of teachers violated neither the state constitution nor the fourteenth amendment and that the school district was entitled to governmental immunity.

In the second cheerleader case, a twenty-year-old college cheerleader sustained a permanent injury to her elbow during an unsupervised practice on astroturf.²⁹ The cheerleader was not warned of the dangers

26. *Beckett v. Clinton Prairie School Corp.*, 504 N.E.2d 552 (Ind. 1987).

27. *Massie v. Persson*, 729 S.W.2d 448 (Ky. Ct. App. 1987).

28. *Stout v. Grand Prairie Indep. School Dist.*, 733 S.W.2d 290 (Tex. Ct. App. 1987).

29. *Kirk v. Washington State Univ.*, 746 P.2d 285 (Wash. 1978).

of astroturf, which is harder than grass and results in more injuries. Plaintiff's injury to her elbow is permanent; she will have continued pain and arthritis in the area. She also became depressed and suicidal after the injury and spent over a month in a psychiatric ward. The state superior court entered judgment in favor of the cheerleader and awarded her over \$350,000 in damages and both parties appealed. The Supreme Court of Washington affirmed the decision and concluded that the award was not so excessive as to shock the conscience of the court.

En Route to Game

In Louisiana, a van driven by a student athlete struck a pickup in a controlled intersection. The driver of the truck sued the university. The sole issue before the court was whether the institution could be held liable under either the doctrine of respondeat superior or a theory of direct negligence in selecting a driver for the van. The lower court had granted summary judgment to the university and that decision was affirmed on appeal to the Court of Appeal of Louisiana.³⁰

In an unusual case, a female member of a tennis team was injured at a motel. She was running away from her teammates, who were involved in a water fight, and fell over a steep bank. The fall injured her knee. The Supreme Court of Appeals of West Virginia held in favor of the hotel and noted that there had been no prior falls in that area and that the athlete went running at full sprint into a dark, unlit area with her eyes unadjusted to the night.³¹ Accordingly, she was ruled to have assumed the risk and to have contributed to her own injury.

Spectators

In the first of two spectator cases, an intoxicated student was injured when he vaulted over a four foot wall and fell thirty feet onto concrete steps. At the time, he was a patron at a football game at a university stadium. A New Jersey appeals court held that the university prohibited alcoholic beverages in the stadium and was not responsible for injuries resulting from violations of the prohibition.³²

In Oregon, the plaintiff was injured at a basketball game when he was attacked by three students. The game was sponsored by the school districts and students from both schools were invited to attend. The Oregon Court of Appeals held that the plaintiff failed to allege facts indicating that the injury was foreseeable. As a result, the court affirmed the lower court decision dismissing the complaint.³³

30. *Nelson v. Ronquillo*, 517 So. 2d 454 (La. Ct. App. 1987).

31. *Ventura v. Winegardner*, 357 S.E.2d 764 (W. Va. 1987).

32. *Allen v. Rutgers Univ.*, 523 A.2d 262 (N.J. Super. Ct. App. Div. 1987).

33. *Cook v. School Dist. UH3J*, 731 P.2d 443 (Or. Ct. App. 1987).

EMPLOYMENT

Thirteen cases affecting the employment of coaches, athletic directors, or athletes were decided in 1987. Of those cases, four dealt with adverse employment decisions, three concerned contract disputes, four were based on sex discrimination, one involved unemployment compensation, and one dealt with workers' compensation.

Adverse Employment Decisions

Within this grouping, adverse employment decisions were mixed in motive or were based on either immorality or insubordination.

General. In a California case, the former director of intercollegiate athletics at San Diego State University petitioned for a writ of mandate for reinstatement, back pay, a liberty hearing, and attorney's fees.³⁴ The termination allegedly was based on the plaintiff's inability to work with senior officials, her firing of university employees, her unfounded belief that she was to receive a pay raise, and her unsubstantiated belief that her office was bugged and that meetings were tape-recorded. A sexual-harassment complaint also had been filed against her, but the university claimed that the complaint was not one of the bases for the termination. The plaintiff claimed that her termination was in fact in response to her contacts with the press and her exercise of speech. A state court of appeal held for the university and concluded that the athletic director served at the pleasure of the university president and was not a permanent employee of the university. Accordingly, she was not entitled to the requested relief.

In a second case, the NCAA ordered the suspension of a state university basketball coach following a lengthy investigation.³⁵ The investigating committee identified thirty-eight rule violations, ten of which involved the plaintiff (Jerry Tarkanian). As a result, the committee directed the University of Nevada at Las Vegas to show cause why additional penalties should not be imposed if it did not suspend Tarkanian from involvement with the university's athletic program for two years. Tarkanian could continue as a professor or administrator, but simply could not be involved in athletics. The Supreme Court of Nevada held that the action of the NCAA was "state action" and required procedural due process. Furthermore, the coach was ruled to have a property and liberty interest in keeping his coaching position.

The Nevada court noted that the present case was distinguishable from those of the United States Supreme Court in *Rendell-Baker v.*

34. *Hill v. Board of Trustees of the Cal. State Univ. Sys.*, 238 Cal. Rptr. 799 (Ct. App. 1987).

35. *Tarkanian v. NCAA*, 741 P.2d 1345 (Nev. 1987).

*Kohn*³⁶ (dismissal of a teacher by a private school) and *Blum v. Yaretsky*³⁷ (medicaid patients in private nursing homes) in that UNLV was a public institution. Also, in those cases the High Court recognized that state action may be present if the private institution exercised powers that were traditionally the exclusive prerogative of the state. In the present case, the state supreme court observed that the right to discipline public employees is traditionally the exclusive prerogative of the state and that the university could not escape its responsibility by delegating that duty to the NCAA.

Immorality. In an Oregon case, a girl's basketball coach was convicted of attempted, second-degree sexual abuse of a team member.³⁸ He allegedly touched the girl "on the thigh area and between her breasts." The coach appealed the jury decision and claimed that the indictment failed to state a crime. Specifically, state law defined "sexual contact" as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party." Accordingly, to violate the statute, a sexual or intimate part must be touched *and* a sexual purpose must exist. In a previous case, the court interpreted this provision by stating that "[i]f the touching is not for sexual purposes, the sexual part is no less sexual and the intimate part is no less intimate, but the touching is not criminal."³⁹ The Oregon Court of Appeals concluded that neither the language nor the legislative history of the statute supported the position that either the human thigh area or the area between female breasts is an intimate part. Therefore, the court concluded that the indictment failed to allege a crime and that a demurrer should have been allowed.

Insubordination. In an Arkansas case, a head football coach was nonrenewed for failure to follow school policies and insubordination.⁴⁰ Among the specific charges was the coach's use of a volunteer assistant coach, in derogation of the instructions from the superintendent and the board, and in violation of state athletic association regulations. The issue before the appeals court was whether the lower court had erred in affirming appellee's nonrenewal without requiring proof of an intentional violation of school policy. Following a review of the facts of the case, the appeals court affirmed the lower court decision that the nonrenewal was not arbitrary, capricious, or discriminatory.

36. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

37. *Blum v. Yaretsky*, 457 U.S. 991 (1982).

38. *State v. Woodley*, 746 P.2d 227 (Or. Ct. App. 1987).

39. *State v. Turner*, 575 P.2d 1007 (Or. Ct. App. 1978).

40. *King v. Elkins Pub. Schools*, 733 S.W.2d 417 (Ark. Ct. App. 1987) (en banc).

Contract Disputes

In 1987, three cases involved breach of contract claims: one affecting an assistant football coach, one involving a head basketball coach, and one brought by a sports agent. In the first case, an unemployed assistant football coach, who was "languishing in the brown waste of West Texas," was allegedly given an informal job offer in Hattiesburg, Mississippi.⁴¹ The assistant proceeded to sell his home, request the transfer of his children's school records, and begin the process of looking for housing in Mississippi. Additionally, his wife quit her job. The head football coach allegedly told the plaintiff that he was his choice for the position and that he needed to formally interview for the job. During the visit, the plaintiff heard for the first time that his appointment had to be approved by the governing board, but felt at the time that the approval was a simple formality. Notwithstanding the plaintiff's impressions, the board did not support his appointment and a formal contract was never offered. The basis for the decision was an unfavorable recommendation by the university president who reportedly "did not like the appearance" of the applicant. The unsuccessful applicant sued claiming a breach of contract. The Mississippi Supreme Court held that neither the university nor the head coach was liable. In support of its decision, the court concluded that the head coach had not extended an employment contract to the prospective assistant and had simply invited him to interview with the understanding that he would support him for the position.

In Arizona, a head basketball coach sued the athletic director and university president for breach of contract, fraud, intentional interference with contractual relations, and intentional infliction of emotional distress. The state appeals court held that the athletic director was acting in his official capacity in recommending that the plaintiff not be rehired; that the recommendation did not constitute an intentional interference with plaintiff's contract; and that the athletic director did not intentionally inflict emotional distress upon the coach.⁴²

The final contract case involved a professional football player and two sports agents.⁴³ Following a review of the events and facts of this case, the court noted that there was a "powerful inference" that the agreement between the player and the agent was actually post-dated and signed before or during the college football season. Notwithstanding this apparently post-dated agreement and the receipt of over \$8,000 from the original agent, the player chose to be represented by another agent, who then negotiated his contract with the Green Bay Packers.

41. *Bruner v. University of S. Miss.*, 501 So. 2d 1113 (Miss. 1987).

42. *Lindsey v. Dempsey*, 735 P.2d 840 (Ariz. Ct. App. 1987).

43. *Walters v. Fullwood*, 675 F. Supp. 155 (S.D.N.Y. 1987).

The court held that the second agent was not subject to personal jurisdiction in New York for allegedly inducing the player in Alabama to breach his contract; that the player did not tortiously interfere with the agents' existing contractual relations; and that the agency agreement and promissory note executed in violation of NCAA rules were not enforceable under New York law.

Discrimination

In 1987 four suits were brought claiming discrimination; each alleged discrimination based on sex. One case involved a university employee, the other three were filed by school district employees. In the first case, a female academic coordinator for a university athletic department was discharged due to student complaints, improper advisement, and the pressuring of faculty to give athletes special consideration in grade assignment and make-up work.⁴⁴ The district court held that the reasons purported by the university were not a pretext to discrimination and that the plaintiff failed to establish that she was discharged because of her sex.

The Appellate Court of Illinois ruled on a case involving a female coach of girls' volleyball.⁴⁵ The coach alleged that she was a victim of sex discrimination because she was being paid less than males performing substantially equivalent coaching duties and was not provided an assistant coach, as were head coaches of boys' sports. The court disagreed with the plaintiff and held that the work was not substantially equal because of significant differences in time commitment. Also, the court noted that pay differentials between coaching positions for male and female sports were based not on the sex of the coaches, but rather the sex of the participants. Such a disparity was found to be valid as long as the differential was based on job responsibilities and requirements.

In a third sex discrimination case, a female physical education instructor brought action challenging the decision of school district officials refusing her the opportunity to become head football coach.⁴⁶ The court held that by not selecting the plaintiff as head coach the district "may have missed an historic opportunity and may in the process have violated its collective bargaining agreement,"⁴⁷ but had not discriminated based on sex. The appeals court concluded that the decision of the district court was not clearly erroneous in finding that the district had acted to fulfill a private contract with the former coach.

44. Gray v. University of Ark., 658 F. Supp. 709 (W.D. Ark. 1987).

45. McCullar v. Illinois Human Rights Comm'n, 511 N.E.2d 1375 (Ill. App. Ct. 1987).

46. Oates v. District of Columbia, 824 F.2d 87 (D.C. Cir. 1987).

47. *Id.* at 93.

In the final case in this subsection, an Equal Pay Act suit was brought by the EEOC alleging that female athletic coaches had been victims of sex discrimination.⁴⁸ The Seventh Circuit upheld in part a lower court finding that the district had violated the EPA, but that the violation was not willful, so as to extend the statute of limitations and allow recovery for one additional year of back pay. Furthermore, the court concluded that the plaintiffs had the burden of persuasion on a title VII claim in proving that the discrimination was deliberate.

Unemployment Compensation

In the sole case in this category, the plaintiff was a part-time soccer coach employed by Siena College. The season was approximately eight weeks long. For his work, plaintiff was paid a salary of \$1,700. Following the season, the college informed the plaintiff that it would like to retain his services for the next season; he accepted. Two weeks later he filed for unemployment insurance benefits. The Unemployment Insurance Appeal Board affirmed an administrative law judge's decision that the plaintiff was entitled to receive benefits without disqualifying conditions. The employer maintained that the coach should not receive benefits because he was a professional athlete; that as a coach his position is analogous to that of a teacher applying for benefits during summer vacation; and that he did not serve in an instrumental capacity. The state appeals court held that the coach was not a professional athlete and was employed in an instructional capacity. Furthermore, the court distinguished the present case from those filed by teachers and noted that the plaintiff was seeking benefits during the academic year, rather than during the summer months.⁴⁹

Workers' Compensation

In a South Dakota case, a basketball coach from Huron College sought workers' compensation allegedly due to a mental disability caused by circumstances within his employment (e.g., practice gear and game uniforms were stolen; three players had not graduated from high school, one was AWOL from the service, and two others were academically ineligible; a threat on his life; pressure to sign work-study forms when the players had not performed the work; location of his office in a storage area; condition of his office—water leaks and a falling ceiling; general discipline problems). He was diagnosed as having a possible

48. *EEOC v. Madison Community Unit School Dist. No. 12*, 818 F.2d 577 (7th Cir. 1987).

49. *In re Curto*, 517 N.Y.S.2d 107 (App. Div. 1987).

organic brain disorder and was considered suicidal. He later jumped from a car, traveling fifty-five to sixty-five miles per hour, and was injured. The workers' compensation hearing officer found that his injuries were not compensable, and the coach appealed. The circuit court reversed and the college appealed. The state supreme court also reversed and held that a mental disability produced solely by mental stimuli or stress is not compensable under state law.⁵⁰

MISCELLANEOUS

This year, the miscellaneous category includes cases on the use of an amusement tax, access to school and university records, and the collection of athletic fees.

Amusement Tax

The city of Morgantown, West Virginia sought a declaration that West Virginia University must collect the city's 2% amusement tax on the sale of tickets to university entertainment and athletic events. The court disagreed and held that the sports and entertainment events sponsored by the university were not conducted for private profit, and thus were not subject to the amusement tax.⁵¹ In reaching its decision, the court observed that the word "private" means "intended for or restricted to the use of a particular person or group or class of persons" and requires that the recipients not be "freely available to the public." The court noted that in the present case, no individual person, company, or interest stood to profit from the events and the profits therefore were not private.

Public Records

In 1987 four cases were brought concerning the availability of public records; all were filed against universities. In the first case, two universities sought permission to intervene in litigation brought by other plaintiffs seeking documents from two voluntary university regulatory associations. The district court had denied the motion to intervene, and the universities appealed. The Fifth Circuit held that there was insufficient adversity of interest between the universities and the regulatory associations to allow the universities to intervene in the disclosure action.⁵²

50. *Lather v. Huron College*, 413 N.W.2d 369 (S.D. 1987).

51. *City of Morgantown v. West Virginia Bd. of Regents*, 354 S.E.2d 616 (W. Va. 1987).

52. *Kneeland v. NCAA*, 806 F.2d 1285 (5th Cir. 1987).

Southern Methodist University was involved in two actions in 1987 regarding access to records. In the first case, a newspaper and an assistant sports editor brought an action against the athletic conference seeking a declaration that the Open Records Act required the conference to divulge correspondence concerning allegations that selected NCAA member institutions violated association rules regulating recruitment of student athletes. The university filed a counterclaim seeking a declaration that the conference was not a governmental body and therefore not subject to the Act. The newspaper then declared a nonsuit of its action against the conference and moved to dismiss the counterclaim. The lower court dismissed the counterclaim and the university appealed. The state appeals court held that the declaration of nonsuit rendered the university's counterclaim nonjusticiable.⁵³

In the second suit involving Southern Methodist University, as well as other private universities within the state of Texas, the court was required to determine whether the state Open Records Act applied to private institutions. The lower court had granted the institutions' motion for summary judgment and denied the newspaper's motion for partial summary judgment. On appeal, the court held that the schools were not governmental bodies subject to the Open Records Act and that the lower court had not abused its discretion in awarding attorney's fees to the universities.⁵⁴

The final case involving the availability of public records emanated from a dispute in North Carolina. A press association and a newspaper publisher sought an order compelling the disclosure of specific reports prepared by chancellors of several universities within the University of North Carolina system. The reports included information and recommendations from the chancellors regarding intercollegiate athletics—including length of athletic seasons, number of contests, and recruitment practices. A lower court judge had ordered that the reports be made available for public inspection and the plaintiffs appealed. The appeals court held that the issue was now moot since the materials already had been made public.⁵⁵

Student Athletic Fees

In the final case in this section and chapter, university students brought action challenging the transfer of student athletic fees from the board of regents to the athletic association. The complaint contained

53. *Southern Methodist Univ. v. Times Herald Printing Co.*, 729 S.W.2d 129 (Tex. Ct. App. 1987).

54. *A.H. Belo Corp. v. Southern Methodist Univ.*, 734 S.W.2d 720 (Tex. Ct. App. 1987).

55. *North Carolina Press Ass'n, Inc. v. Spangler*, 360 S.E.2d 138 (N.C. Ct. App. 1987).

four observations: (1) athletic fees are collected from each student and become state funds; (2) the board transfers the fees in a lump sum to the association; (3) there is no delivery of goods, services, or the like to serve as consideration for the transfer of the fees; and (4) the transfer of the fees violates the Georgia Constitution. The lower court had granted summary judgment to the athletic association and the students appealed. The state supreme court held that the transfer of fees was not a "gratuity," within the meaning of a state constitutional provision prohibiting the granting of any donation or gratuity of state funds. The court concluded that the transfer of funds was permissible because of the substantial benefits received by the university from its relationship with the association.⁵⁶

56. *Haggard v. Board of Regents of the Univ. Sys. of Ga.*, 360 S.E.2d 566 (Ga. 1987).